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3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT SEATTLE

6 AECON BUILDINGS, INC.,

7 Plaintiff,

8 v.

9 ZURICH NORTH AMERICA, et al.,

10 Defendant.
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Case No. C07-0832MJP

ORDER DENYING
PLAINTIFF'S MOTION FOR
RECONSIDERATION

12 This matter comes before the Court on Plaintiff's motion for reconsideration and/or
13 clarification of the Court's order granting in part and denying in part Zurich's motion for partial
14 summary judgment on the issue of damages. (Dkt. No. 257.) After carefully reviewing the
15 motion, the balance of the record, and governing law, the Court DENIES Plaintiff's motion for
16 the reasons set forth below.

17 **Background**

18 The parties and the Court are familiar with the general facts of this case, so the Court will
19 not repeat them here. On August 29, 2008, the Court issued an order granting in part and
20 denying in part Zurich's motion for partial summary judgment on the issue of damages. (Dkt.
21 No. 235.) In that order, the Court (1) denied Zurich's motion on the issue of judicial estoppel,
22 id. at 4-5, (2) gave leave for Zurich to amend its answer to plead offset, id. at 5-6, (3) limited the
23 indemnity portion of Aecon's damages to the work attributable to Western Partition's faulty
24 work, id. at 6-7, and (4) determined that Defendants were not jointly and severally liable for the
25 unrecovered balance of the Quinault settlement. Id. at 7-8. On September 5, 2008, Aecon filed
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1 its motion for reconsideration and/or clarification of the Court’s order. (Dkt. No. 257.)
2 Specifically, Aecon asserts that the Court’s rulings on the measure of indemnity damages and the
3 absence of joint and several liability are clear, reversible errors. Id. at 2. Alternatively, Aecon
4 asks the Court to certify these two questions to the Washington Supreme Court. Id. at 2-3.

6 **Discussion**

7 **I. Standard for Reconsideration**

8 Motions for reconsideration are disfavored. CR 7(h). Absent either a showing of
9 manifest error or new facts or law that could not have been brought to the Court’s attention
10 earlier, the Court will generally deny motions for reconsideration. Id.

11 **II. Indemnity Damages**

12 Plaintiff seeks to have the Court reconsider its decision that Zurich’s indemnity damages
13 are limited to what is attributable to Western Partitions. (Dkt. No. 257 at 3-4.) Plaintiff relies on
14 Kirk for the proposition that the contractual limits of the insurance policies do not limit
15 indemnity damages in a bad faith action. Kirk v. Mt. Airy Ins. Co., 134 Wn.2d 558, 561-62
16 (1998). Kirk, however, is distinguishable on the facts. In Kirk, the Washington Supreme Court
17 found that, where a single insurer had been held in bad faith for a single injury, the contractual
18 insurance policy could not provide the measure of damages. Id. at 562. In this case, there are
19 two bad faith insurers covering two subcontractors involved in a construction dispute that
20 includes many subcontractors. Aecon would have the Court view its global settlement of claims
21 with Quinault as a single injury. See e.g. Pl.’s Mot. For Recons. (Dkt. No. 257) at 6 (“Aecon’s
22 indemnity damages against Zurich are only limited by the total amount of its settlement with The
23 Quinault, i.e. \$3.75 million...”). However, the settlement includes damages for construction
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1 work completed by companies other than Western Partitions (insured by Zurich) and Chinook
2 (insured by Hartford). The holding in Kirk is inapplicable in the present case because the
3 settlement in Kirk was far more narrow than the broad settlement between Aecon and the
4 Quinault. Thus, the Court denies reconsideration of its determination limiting Zurich's
5 indemnity damages to the work attributable to Western Partitions's faulty construction.
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7 III. Joint and Several Liability

8 Aecon further asks the Court to reconsider its ruling that Defendants are not jointly and
9 severally liable for the unrecovered balance of the settlement. Pl.'s Mot. for Recons. (Dkt. No.
10 257) at 7. In support of its argument that damages are joint and several, Aecon points to RCW
11 4.22.070(1) which outlines the scope of joint and several liability in Washington. The statute
12 provides that, while several liability is the general rule for actions involving the fault of more
13 than one entity, if the injured party is not at all at fault, the defendants against whom a judgment
14 is entered are jointly and severally liable. RCW 4.22.070(1)(b). Aecon's reliance on the statute
15 is misplaced because the statute presumes that there is only one underlying injury. As described
16 above, Aecon suffered distinct injuries from Hartford and Zurich's bad faith. Defendants here
17 are not joint tortfeasors of a single tort. The Court denies reconsideration of its determination
18 that Zurich and Hartford are not jointly and severally liable for the balance of the Quinault
19 settlement.
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22 IV. Certification

23 Finally, in response to an adverse ruling, Aecon belatedly asks the Court to certify these
24 issues to the Washington Supreme Court. Pl.'s Mot. for Recons. (Dkt. No. 257) at 8-9. The
25 Court has already ruled on these issues. The Court declines to certify either to the Washington
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1 Supreme Court. Certification is not be used as a back door to an appeal or to forum shop after
2 the ruling has been made.

3 **Conclusion**

4 For the foregoing reasons, the Court DENIES Plaintiff's motion for reconsideration.

5 The Clerk is directed to send a copy of this order to all counsel of record.
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8 Dated: September 18, 2008.

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12 Marsha J. Pechman

13 United States District Judge
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